Nos. 11-1545 and 11-1547

In the Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF HOME BUILDERS, NFIB SMALL BUSINESS LEGAL CENTER, NATIONAL MINING ASSOCIATION, AND RETAIL LITIGATION CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ELLEN STEEN
DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Ave. SW
Suite 1000W
Washington, DC 20024
(202) 406-3618

Counsel for American Farm Bureau Federation

JOHN P. ELWOOD
Counsel of Record
JEREMY C. MARWELL
VINSON & ELKINS LLP
2200 Pennsylvania Ave. NW,
Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

Counsel for Amici Curiae

[Additional Counsel Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

THOMAS J. WARD
AMY C. CHAI
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, NW
Washington, DC 20005
(202) 266-8200

Counsel for National Association of Home Builders

KAREN R. HARNED
ELIZABETH MILITO
NFIB SMALL BUSINESS LEGAL CENTER
1201 F. Street, NW
Suite 200
Washington, DC 20004
(202) 406-4443

Counsel for NFIB Small Business Legal Center

DEBORAH R. WHITE
RETAIL LITIGATION CENTER
1700 N. Moore Street
Suite 2250
Arlington, VA 22209
(703) 841-2300

Counsel for Retail Litigation Center

ROBIN S. CONRAD
RACHEL L. BRAND
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20063
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America

KATIE SWEENEY
NATIONAL MINING ASSOCIATION
101 Constitution Ave., NW
Suite 500 East
Washington, DC 20001
(202) 463-2600

Counsel for National Mining Association

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INTEREST OF *AMICI CURIAE* [1]

The American Farm Bureau Federation ("Farm Bureau") was formed in 1919 and is the largest non-profit general farm organization in the United States. Representing more than 6.2 million member facilities in all 50 States and Puerto Rico, the Farm Bureau maintains a membership that produces every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers. To that end, the Farm Bureau has regularly participated as amicus curiae in this Court in cases involving the proper scope of federal regulation and jurisdictional limits on the authority of federal administrative agencies. Among other things, the Farm Bureau participated as *amicus curiae* in *Rapanos* v. *United States*, 547 U.S. 715 (2006), successfully urging the Court to enforce the Clean Water Act's statutory limits on federal jurisdiction to regulate wetlands.

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, and their counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing the proper scope of federal regulation.

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 130,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes built each year in the United States. NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the rights and interests of its members.

The National Federation of Independent Business Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C.,

and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. To fulfill its role as the voice for small business, the NFIB Small Business Legal Center frequently files amicus briefs in cases that will affect small businesses.

The National Mining Association ("NMA") is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings affecting the retail industry. The member entities whose interests RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts

with retail industry perspectives on significant legal issues and to highlight the potential industry-wide consequences of legal principles that may be determined in pending cases.

Amici have a substantial interest in this case because their members are subject to the jurisdiction of federal administrative agencies in a wide range of substantive areas. Collectively, *amici* represent hundreds of thousands of U.S. businesses that have extensive experience with agency efforts to expand their jurisdiction beyond the authority delegated to them by Congress. Independent judicial review has long served as a critical bulwark for *amici*'s members against the unchecked expansion of federal regulation. Granting deference to administrative agencies' interpretations of the statutes that define their jurisdiction would, in the view of *amici* and their members, remove an essential guarantee of limited government and democratic accountability.

SUMMARY OF ARGUMENT

At the heart of this case is the question whether federal courts must defer, under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to administrative agencies' interpretation of their own jurisdiction. Expanding the scope of "*Chevron*'s domain" to agency jurisdictional determinations would have vast—and troubling—implications for the administrative state.

Petitioners, respondents supporting petitioners, and their other *amici* set forth compelling doctrinal arguments why courts should not defer to agency interpretations of their own jurisdiction. This brief

complements those arguments by demonstrating the wide range of circumstances in which jurisdictional questions have arisen, and the extraordinary legal and economic significance of the issues presented. Historically, *de novo* judicial review of agency assertions of jurisdiction has served as an essential check against agency aggrandizement of power. That safeguard not only protects regulated entities, but also helps preserve the proper allocation of authority within the federal government and the relationship between the federal government and the States. Regardless whether an agency assertion of jurisdiction is warranted in a given case, jurisdictional questions are sufficiently important to require courts to make their own independent determination.

The main objection jurists have voiced about a no-deference rule is a practical concern that courts will have difficulty distinguishing jurisdictional from non-jurisdictional questions. But the possibility of close cases does not justify expanding *Chevron* deference, especially where, as here, the issue unquestionably involves the scope of agency jurisdiction. As the court of appeals correctly recognized, this case presents the threshold question of whether Congress delegated authority to the Federal Communications Commission ("FCC") to interpret the statutory provision at issue—wholly apart from the question whether the FCC's interpretation of that provision was a permissible one. No deference is due on that threshold jurisdictional question.

Moreover, even as to the broader class of cases that involve whether the agency used its interpretive authority over a provision permissibly, line-drawing

concerns do not justify extending *Chevron*. Such concerns are no more substantial than in other areas where courts identify limits on jurisdiction. Courts can draw on traditional tools of statutory interpretation and, in close cases, familiar background principles. Line-drawing concerns can also be expected to diminish over time, because a no-deference rule will give Congress a beneficial incentive to legislate clearly in defining agency jurisdiction.

BACKGROUND

This case involves a dispute between local governments and the FCC about the agency's assertion of jurisdiction under Section 332(c)(7) of the Telecommunications Act, 47 U.S.C. § 332(c)(7), to regulate state and local land-use decisions about the placement of wireless communications facilities. Captioned "[p]reservation of local zoning authority," Section 332(c)(7) begins with a blanket reservation of authority: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government * * * over decisions regarding the placement, construction, and modification of personal wireless service facilities." *Id.* § 332(c)(7)(A). Subparagraph (B) then lists exceptions to the rule, requiring state and local governments to (among other things): "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time"; and not regulate "on the basis of the environmental effects of radio frequency emissions" to the extent such facilities comply with FCC regulations. *Id.* § 332(c)(7)(B)(ii), (iv).

Section 332(c)(7)(B)(v) divides jurisdiction over violations of subparagraphs (i)–(iv) between the FCC and courts. Challenges to a state or local "final action or failure to act" that is "inconsistent with * * * subparagraph [(B)]" may be brought in a "court of competent jurisdiction." *Id.* § 332(c)(7)(B)(v). But persons aggrieved under the "radio frequency emission" restriction in subparagraph (iv) "may petition the [FCC] for relief." *Id.*

ARGUMENT

As petitioners, respondents supporting petitioners, and their other *amici* explain, there are compelling reasons why courts should not defer to agency decisions about their own jurisdiction. A no-deference rule follows from the core principle that an agency "literally has no power to act * * * unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986); accord *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Also, because expanding federal jurisdiction often intrudes into areas of traditional state authority, recognizing agency authority based on absent or ambiguous statutory language violates the rule that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985)). Agencies have no comparative expertise or advantage in interpreting jurisdictional statutes. To the contrary, there is a risk that agency self-interest will cause them systemati-

cally to exaggerate the scope of their authority. This Court has never held that agency jurisdictional interpretations are entitled to deference, and a faithful reading of its cases supports the contrary rule.

There are two principal types of jurisdictional inquiries: first, whether Congress has delegated interpretive authority over a provision to an agency; and second, whether the agency has used its interpretive authority over a provision permissibly. This Court has reviewed *de novo* whether Congress delegated interpretative authority to an agency in the first instance. See, *e.g.*, *United States* v. *Mead Corp.*, 533 U.S. 218, 231–233 (2001). The court of appeals correctly identified that question but erred by affording *Chevron* deference to the FCC's view about whether Congress had intended it, and not a court, to define a "reasonable period of time" under Section 332(c)(7)(B)(ii). That jurisdictional question is analytically distinct from, and antecedent to, a range of other jurisdictional questions involving whether the agency's interpretation is permissible, such as whether the FCC's interpretation of a "reasonable period of time" to mean 90 or 150 days improperly infringed state authority.

The argument against deference is strengthened by understanding the variety of circumstances in which jurisdictional questions have arisen, and the tremendous legal and economic significance of the issues presented. *De novo* judicial review serves as an essential check against agency aggrandizement of power. That constraint not only protects the interests of regulated entities, but also prevents federal intrusion into areas of traditional state authority

and preserves the allocation of power within the federal government. Whether or not an agency's assertion of jurisdiction is ultimately appropriate in a given case, jurisdictional questions are sufficiently important to warrant independent determination by courts.

The main objection jurists have expressed about a no-deference rule is not theoretical or doctrinal, but rather the practical concern that courts will have difficulty distinguishing jurisdictional from non-jurisdictional questions. But the possibility of close cases does not justify expanding *Chevron*, especially where—as here—an issue unquestionably concerns agency jurisdiction, in the sense of a delegation of interpretive authority. Moreover, as to jurisdictional issues generally, line-drawing concerns are no more substantial than in other areas where courts identify jurisdictional questions. Courts can draw on traditional tools of statutory interpretation and, in close cases, several familiar background principles.

Moreover, denying *Chevron* deference would give Congress a salutary incentive to speak clearly about agency jurisdiction, "assur[ing] that the legislature has in fact faced, and intended to bring into issue," *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation marks omitted), the implications of extending agency regulatory authority to an area. Such a course would be consistent with the "common sense" understanding that Congress is unlikely "to delegate a policy decision of [great] economic and political magnitude to an administrative agency" without saying so clearly. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). If *Chevron*

were applicable, Congress foreseeably would favor vague jurisdictional statutes in the expectation of using political pressure or oversight authority to affect later agency decisionmaking. See Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1545–1546 (2009). Congress lacks similar mechanisms to influence courts, increasing the risk and cost to Congress of enacting vague statutes. Leaving jurisdictional determinations to the independent judgment of courts would thus provide Congress an incentive to answer clearly the most basic of administrative-law questions: whether it has delegated authority to an agency to act in a particular area.

I. *De Novo* Judicial Review Of Jurisdictional Questions Is A Critical Safeguard Against Agency Aggrandizement

The examples discussed below illustrate that agencies have frequently sought to expand their jurisdiction across a broad range of substantive areas, and that jurisdictional questions often have extraordinary practical, economic, and legal significance that underscores the need for *de novo* judicial review. By applying a less-searching standard of review, *Chevron* deference would inevitably uphold agency assertions of jurisdiction that lack a proper statutory basis.

1. Jurisdiction to regulate the "waters of the United States"

The longstanding—and ongoing—efforts by the U.S. Army Corps of Engineers ("Corps") and the U.S.

Environmental Protection Agency ("EPA") to expand their Clean Water Act jurisdiction to cover vast swaths of land illustrates the consequences of agency efforts to expand the sweep of their authority. Non-deferential review by this Court has served as a critical check on an unprecedented expansion of federal jurisdiction.

The Clean Water Act authorizes EPA and the Corps to regulate the discharge of pollutants into "navigable waters," defined to mean "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1251, 1344, 1362(7). In 1977 and 1980, the Corps and EPA promulgated regulations defining "the waters of the United States" to include navigable and tidal waters, tributaries, certain wetlands, impoundments, and other waters "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3). The agencies interpreted this definition as coextensive with the reach of the Commerce Clause, 42 Fed. Reg. 37,122, 37,144 n.2 (July 19, 1977), but initially acknowledged that many waters fell outside the scope of that jurisdiction.[2]

The intervening decades, however, saw an "immense expansion of federal regulation of land use * * * under the Clean Water Act—without any change in the governing statute." *Rapanos* v. *United*

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[2] See 45 Fed. Reg. 33,290, 33,398 (May 19, 1980) (preamble) ("[S]mall, isolated wet areas may not be waters of the United States * * * because * * * their destruction or degradation would not have any effect on interstate commerce.").

States, 547 U.S. 715, 722 (2006) (plurality opinion). This Court has rejected efforts by the Corps and EPA to stretch their jurisdiction "beyond parody," *id.* at 734 (plurality opinion), seeking to regulate ever-expanding tracts of land with increasingly tenuous connections to "navigable waters."

In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), this Court rejected the Corps' assertion of jurisdiction to regulate an abandoned sand and gravel pit based on the presence of isolated "seasonal ponds" used by migratory birds. The Court noted that the Corps had originally taken a much narrower view of its jurisdiction. Deference to the agency's claim of jurisdiction was inappropriate, the Court explained, because the agencies' interpretation "invoke[d] the outer limits of Congress' power" and "alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power," without a "clear indication that Congress intended that result." *Id.* at 172–174. Accordingly, the Court held that "nonnavigable, isolated, intrastate waters" that do not "actually abu[t] on a navigable waterway" fall outside the agencies' jurisdiction. *Id.* at 167, 172.

Unchastened by that defeat, the agencies devised a different but equally expansive theory of jurisdiction. Seeking to distinguish *SWANCC* as involving only "isolated" waters, the Corps asserted jurisdiction to regulate waters having *any connection* to navigable waters. In particular, the agencies asserted jurisdiction over "tributaries"—defined expansively to include farm and flood control ditches, drain tiles,

storm drain systems, pipes, rainfall runoff, and desert washes—that connected otherwise non-jurisdictional areas to navigable waters. Regulation of the tributaries was, in turn, the basis for asserting jurisdiction over upland areas, on the theory that water there was connected to navigable waters through the hydrological cycle.

Rapanos emphatically rejected the agencies' "'Land is Waters' approach to federal jurisdiction." 547 U.S. at 734 (plurality opinion). The plurality observed that over the preceding 30 years, the agencies had "interpreted their jurisdiction over 'the waters of the United States' to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States," as well as "virtually any parcel of land containing a channel or conduit * * * through which rainwater or drainage may occasionally or intermittently flow." *Id.* at 722. That regulatory expansion had imposed tremendous costs on those who found themselves in the path of the agencies' expansion: The plurality noted that the average permit applicant spends "788 days and $271,596 in completing the process," more than $1.7 billion each year is spent nationwide obtaining wetlands permits, and violations carry the threat of criminal liability and civil fines. *Id.* at 721.

In the plurality's view, the agencies' assertion of jurisdiction could not be reconciled with the plain meaning of the statute. Even if the statutory text *were* ambiguous, the agencies' interpretation would be impermissible: The Corps "function[ing] as a *de facto* regulator of immense stretches of intrastate

land" would constitute an "unprecedented intrusion into traditional state authority" and would "stretc[h] the outer limits of Congress's commerce power." *Id.* at 738. Justice Kennedy likewise criticized the Corps' interpretation for "leav[ing] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water," *id.* at 781 (Kennedy, J., concurring in judgment), and concluded that waters fall within federal jurisdiction only if they have a "significant nexus" to waters that are navigable in fact or could reasonably be so made. *Id.* at 782. Not all of the Justices agreed that the statute was clear on its face; the dissenters would have granted *Chevron* deference to the Corps' jurisdictional interpretation. *Id.* at 788 (Stevens, J., dissenting).[3]

Despite these defeats, the agencies appear undeterred in their efforts to expand their regulatory jurisdiction "without any change in the governing statute." *Rapanos*, 547 U.S. at 722 (plurality opin-

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[3] Given the sharp disagreement about whether the statutory text was unambiguous, the case may reflect the reality that uncertainty about deference to jurisdictional questions has led some courts to guard against aggrandizement "primarily by exercising especially vigorous statutory interpretation at *Chevron*'s step one when agencies press the limits of their authority, not by creating an exception to *Chevron* deference." Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833, 911 (2001); *Smiley* v. *Citibank (S.D.)*, 517 U.S. 735, 739 (1996) (finding it "difficult indeed to contend that * * * [the statute] [wa]s unambiguous with regard to the point at issue here" given dissents in the court below and a split of authority in the lower courts).

ion). Efforts to amend the CWA to expand its reach beyond "navigable" waters failed in Congress. See, *e.g.*, America's Commitment to Clean Water Act, H.R. 5088, 111th Cong. §§ 4, 5 (2010); Clean Water Restoration Act, S.787, 111th Cong. §§ 4, 5 (2009). In April 2011, EPA and the Corps released draft "guidance" to "clarify" how they will identify jurisdictional "waters of the United States," with the stated intent to "increase" the "extent of waters over which the agencies assert jurisdiction."[4] *Draft Guidance* 3. The draft guidance asserts jurisdiction over, among other things, "[t]ributaries to traditional navigable waters" and "[w]etlands adjacent to [such] jurisdictional tributaries." *Id.* at 5. The draft guidance treats wetlands as jurisdictional if they, "alone or *in combination with similarly situated lands* in the region," have a significant nexus to traditional navigable waters. *Id.* at 23 (emphasis added). This "aggregation" theory will have significant practical consequences, allowing the agencies to assert jurisdiction over lands that themselves lack a significant nexus to navigable waters merely because they purportedly have the necessary relationship when combined with all other "similarly situated lands in the region."

The ever-expanding assertion of federal authority over lands in the guise of regulating "navigable waters" is perhaps the most stark illustration of the dangers of giving decisive weight to agencies' views

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[4] See U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (Apr. 2011), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf.

about the scope of their own jurisdiction—and in particular, of the high federalism costs that such a course would entail as federal agencies "imping[e] o[n] the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. But fundamentally, it is only a single example of a widespread phenomenon—that where agencies *can* construe ambiguity to expand their jurisdiction, they *will* do so.

2. The "ancillary jurisdiction" of the Federal Communications Commission

This Court and lower courts have also closely scrutinized expansions of the FCC's "ancillary jurisdiction." Title I of the Telecommunications Act of 1934 grants the FCC jurisdiction to regulate "all interstate and foreign communication by wire or radio." 47 U.S.C. § 152(a). This Court has recognized that the Commission may exercise jurisdiction either pursuant to express statutory authority, or pursuant to its "ancillary jurisdiction." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 380 (1999); *United States* v. *Sw. Cable Co.*, 392 U.S. 157, 167 (1968). To regulate under ancillary jurisdiction, two conditions must be met: (1) the "subject of the regulation must be covered by the Commission's general grant of jurisdiction under Title I," *Am. Library Ass'n* v. *FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005) ("*ALA*"); and (2) the subject of regulation must be "reasonably ancillary to the effective performance of the Commission's various responsibilities." *Sw. Cable*, 392 U.S. at 178.

Courts have carefully policed the boundaries of the FCC's ancillary jurisdiction, ensuring that this

"somewhat amorphous" doctrine is appropriately "constrained." See *ALA*, 406 F.3d at 692. In *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 691 (1979), this Court rejected a Commission rule that required cable television systems carrying broadcast signals and having 3,500 or more subscribers to develop a 20-channel capacity, make channels available for third-party access, and furnish equipment for access purposes. Because the Act prohibits treating broadcasters as common carriers, this Court held the rule exceeded the Commission's ancillary jurisdiction because it sought to impose common-carrier obligations on cable television systems. While recognizing that the statutory bar on treating broadcasters as common carriers did not expressly extend to cable systems, the Court explained that it would apply the Act's provisions governing broadcasting, because otherwise "the Commission's jurisdiction under [Title I] would be unbounded." *Id.* at 706. The Court distinguished other circumstances in which a "lack of congressional guidance" might otherwise "le[a]d us to defer * * * to the Commission's judgment," *id.* at 708, concluding from the "strong [statutory] indications" (such as the prohibition on treating broadcasters as common carriers) that the Commission's authority "was to be sharply delimited." *Id.*

Lower courts have taken a similarly skeptical approach. *ALA*, for instance, addressed an FCC mandate that equipment manufacturers include digital broadcast copy protection features (a "broadcast flag") that would prevent digital television equipment from *redistributing* a completed broadcast. 406 F.3d at 691. The Commission's explicit jurisdictional

grant, however, extends only to "interstate and foreign communication by wire or radio" (47 U.S.C. § 152(a)) and "apparatus" that are "incidental to * * * transmission," *id.* § 153(40), (59). While recognizing that its assertion of jurisdiction departed from its historical practice (*Digital Broadcast Content Protection*, 18 F.C.C.R. 23,550, 23,566 (2003)), the FCC invoked its ancillary jurisdiction to regulate apparatus even when they were not receiving a broadcast transmission.

The court of appeals held that the FCC had exceeded its ancillary jurisdiction because there was "no statutory foundation for the broadcast flag rules, and consequently the rules are ancillary to nothing." 406 F.3d at 692. This statutory text, the D.C. Circuit explained, did not give the FCC "general jurisdiction" over devices "that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission." 406 F.3d at 700. The court expressly rejected the FCC's "self-serving invocation of *Chevron* [deference]" on the ground that Congress had not delegated authority to regulate in the areas at issue. *Id.* at 699, 705. As a result, the court refused to construe ancillary jurisdiction "in a manner that imposes no meaningful limits on the scope of the FCC's general jurisdictional grant." *Id.* at 703. The court noted that in "seven decades of its existence, the FCC has never before asserted such sweeping authority," and indeed "in the past [had] * * * informed Congress that it lacked any such authority." *Id.* at 691.

3. *Office of Management and Budget jurisdiction to review and reject agency rulemaking under the Paperwork Reduction Act*

Agency aggrandizement of jurisdiction does not always involve an expansion of obligations for regulated entities. In *Dole* v. *United Steelworkers of America*, 494 U.S. 26 (1990), for example, the White House Office of Management and Budget ("OMB") asserted jurisdiction to review and remand a Department of Labor hazard communication regulation that would have required employers to inform employees about the hazards of chemicals used in the workplace. *Id.* at 28–30. OMB concluded certain aspects of the agency's rule were unnecessary to protect employees and remanded it for changes. *Id.* at 30–31. This Court rejected OMB's assertion of jurisdiction to review and remand the rule under the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*, which authorizes review of rules that involve an agency's "information collection request[s]." 494 U.S. at 33 (citing 44 U.S.C. § 3507(a)(2)). In the Court's view, the statute only authorized OMB to review rules that require *collection* of information *by the government* (e.g., tax forms, Medicare forms, compliance reports, and tax records), and distinguished the hazard disclosure rules, which required *disclosure* of information *to a third party*. The Court expressly "decline[d] to defer to OMB's interpretation" of the statute. 494 U.S. at 42 & n.10.

In dissent, Justice White and Chief Justice Rehnquist criticized the majority for not deferring to OMB's interpretation under *Chevron*. 494 U.S. at 43–44 (White, J., dissenting). They pointedly ques-

tioned the majority's conclusion that the statute was unambiguous, noting that the majority opinion took "10 pages, including a review of numerous statutory provisions and legislative history" to support its view that the statute was facially clear. *Id.* at 43. See generally note 3, *supra*.

4. Federal Trade Commission jurisdiction to regulate lawyers as "financial institution[s]"

Although the federalism costs of agency aggrandizement have been particularly acute in the environmental context, see pp. 10-16, *supra*, regulatory expansion in other areas has infringed on matters historically regulated by States. In *American Bar Association* v. *FTC*, 430 F.3d 457, 465, 471 (2005) ("*ABA*"), the D.C. Circuit, recognizing that "regulation of the practice of law is traditionally the province of the states," rejected efforts by the Federal Trade Commission ("FTC") to regulate attorneys engaged in the practice of law as "financial institution[s]" under the Gramm-Leach-Bliley Financial Modernization Act. That Act authorizes the FTC to promulgate regulations "with respect to financial institutions * * * subject to [its] jurisdiction under section 6805," 15 U.S.C. §§ 6801(a), 6804(a)(1), to safeguard the privacy of their customers.

The FTC maintained that attorneys engaged in the practice of law were subject to the Act's requirements, emphasizing that nothing in the Act explicitly prohibited it from regulating attorneys. The D.C. Circuit sharply rejected that position, explaining that "if we were to presume a delegation of power from the absence of an express withholding of such

power, agencies would enjoy virtually limitless hegemony." 430 F.3d at 468 (internal quotation marks omitted). The court perceived no ambiguity sufficient to justify reaching *Chevron* step 2, finding no indication in the statute that Congress intended to regulate the profession of law. *Id.* at 469. In the alternative, the court concluded that the agency's interpretation was unreasonable under *Chevron* step 2, in part because regulation of the practice of law has been "the province of the states * * * throughout the history of the country." *Id.* at 471–472. The court refused to uphold a regulation that would so "alter the usual constitutional balance between the States and the Federal Government" absent a clear congressional statement that it intended do so. *Id.* (internal quotation marks omitted).

5. *Department of Transportation jurisdiction to authorize money damages as a remedy for violations of the Americans with Disabilities Act*

Agency attempts to expand jurisdiction can affect not only the federal-state balance, but also the division of authority between the branches of government. That principle is illustrated by the case at bar, in which the FCC has asserted jurisdiction to define a term ("a reasonable period of time") that will establish a rule of decision to a type of challenge that Congress has provided will be resolved in court. 47 U.S.C. § 332(c)(7)(B)(v). Compare Pet. App. 43a (FCC's interpretation would "guide courts' determinations of disputes under [Section 332(c)(7)(B)(ii)]"), with *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (affording no deference where "Congress has expressly established the Judiciary and not the

[agency] as the adjudicator of private rights of action arising under the statute").

American Bus Association v. Slater, 231 F.3d 1 (2000), provides another example. There, the D.C. Circuit held that the Department of Transportation ("DOT") lacked authority to promulgate a rule authorizing money damages against bus companies for violations of the Americans with Disabilities Act ("ADA"). The ADA authorizes DOT to promulgate rules about the accessibility of large inter-city buses. 42 U.S.C. § 12186. DOT promulgated a rule that not only set accessibility standards (*e.g.*, boarding assistance and wheelchair lifts), but required bus companies to pay monetary compensation to passengers for violations. 231 F.3d at 3. The D.C. Circuit held that Congress had clearly precluded DOT from authorizing a money damages scheme. The court relied in part on a statutory provision authorizing the Attorney General to bring a civil action for money damages—a provision that, in the court's view, made clear that money damages could only be "awarded by a court" through a civil action. *Id.* at 5. Judge Sentelle wrote separately, pointedly rejecting the agency's argument that "the absence of a statutory grant of power is itself an ambiguity that calls for *Chevron* deference." *Id.* at 8 (Sentelle, J., concurring). He emphasized that "a statutory silence on the granting of a power is a *denial* of that power to the agency," and thus "a statute that is completely silent on the question of whether it confers a power does not vest the agency with the discretion to determine the scope of that power." *Id.* at 8–9. In Judge Sentelle's view, it would have "ma[de] a mockery of *Chevron*" to

suggest that deferential step 2 review is implicated by Congress's "failure to deny a power to an agency." *Id.* at 9.

6. Department of Homeland Security authority to modify the jurisdiction and authority of the Federal Labor Relations Authority

Agency attempts to expand jurisdiction also have implications for the division of authority within the federal administrative state. *National Treasury Employees Union* v. *Chertoff*, 452 F.3d 839, 866 (D.C. Cir. 2006) ("*NTEU*"), for instance, involved regulations promulgated by the Department of Homeland Security ("DHS") and Office of Personnel Management establishing a human resources system for DHS. Among other things, the DHS regulations sought to channel certain labor disputes involving DHS employees to the Federal Labor Relations Authority ("FLRA"). The DHS regulations would have required the FLRA—an independent agency with statutory jurisdiction to adjudicate certain federal employee claims and labor disputes—to defer to findings of fact and interpretations of law made by the Homeland Security Labor Relations Board ("HSLRB"), and would have authorized the HSLRB to assume jurisdiction over any dispute if it determined that the matter affected homeland security.

The D.C. Circuit declined to defer to DHS's interpretation of its statutory authority. The court rejected the agency's theory that courts should "presume a delegation of power" simply because Congress had not explicitly "with[e]ld * * * such power" from the agency—a result the court explained would

give agencies "virtually limitless hegemony." 452 F.3d at 866 (internal quotation marks omitted). Further, the agency's interpretation of the statute "would allow [DHS] to overtake *any* agency to achieve its own ends." *Id.* The DHS regulations, the court observed, purported to impose a "novel procedural scheme" on the FLRA, "even though nothing in the [Act] authorizes DHS to regulate the work of the Authority or alter its statutory jurisdiction." *Id.* at 865. The rule sought to conscript FLRA into reviewing a group of cases DHS had selected, and to redefine the FLRA's statutory role. *Id.* at 865–866.

7. EPA authority to withdraw specification of discharge sites after the Army Corps has issued a Clean Water Act permit

The need for *de novo* judicial review of jurisdiction to preserve the division of authority among agencies is likewise apparent in the Clean Water Act context. Section 404 of the Act vests the Corps with authority to issue permits for discharges into navigable waters. 33 U.S.C. § 1344. Congress, however, granted EPA a limited veto authority, empowering EPA to "prohibit * * * [,], deny or restrict" the specification of a disposal site ("including the withdrawal of specification") "whenever" EPA determines discharge will have certain adverse environmental effects. *Id.* § 1344(c). In *Mingo Logan Coal Co.* v. *EPA*, 850 F. Supp. 2d 133 (D.D.C. 2012), the court rejected EPA's asserted authority to withdraw a disposal-site specification *after* the Corps had issued a permit. EPA argued that its "withdrawal" had the legal effect of invalidating the discharge permit, even while conceding the statute vested authority to

grant and revoke permits in the Corps (which had declined EPA's request to revoke the permit). *Id.* at 142. The court refused to afford *Chevron* deference, in part because of the statute's "clear scheme of shared responsibility." *Id.* at 145–146. The court held the statute did not clearly grant EPA the authority to revoke a permit, and the agency's reading was in any event unreasonable, impinging on the Corps' permitting authority. *Id.* at 152–153.

8. Interstate Commerce Commission regulation of container transportation wholly inside a private terminal facility, based on statutory authority to regulate shipments "on a public highway"

The practical consequences of extending *Chevron* deference are clearest where courts have "deferred" to agency interpretations even while expressing doubts that the interpretation is permissible. Those cases illustrate that according deference is often outcome-determinative and can result in courts validating assertions of jurisdiction that are dubious at best. *P.R. Maritime Shipping Authority* v. *Valley Freight Systems, Inc.*, 856 F.2d 546 (3d Cir. 1988), for instance, involved the jurisdiction of the Interstate Commerce Commission ("ICC") to regulate "transportation by motor carrier * * * to the extent that passengers, property, or both, are transported by motor carrier * * * on a public highway." *Id.* at 551 (quoting 49 U.S.C. § 10521 (1982)). The agency maintained that transportation that occurred wholly within a privately controlled terminal facility was subject to a tariff that applied only to shipments under ICC jurisdiction. The shipper argued the tariff

did not apply because the shipments were not "on a public highway."

The court felt itself obliged to grant *Chevron* deference to the agency's interpretation and to uphold its decision to treat such shipments as being "on a public highway." 856 F.2d at 552. *Chevron* deference, the court believed, is "fully applicable to an agency's interpretation of its own jurisdiction." *Id.* The court noted its reservations about the curious result that a private facility was "a public highway," emphasizing that "one might reasonably prefer [the shipper's] reading of the 'on a public highway' requirement" to what it delicately termed "the Commission's less-than-literal interpretation." *Id.*

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As the above examples illustrate, agencies have attempted to expand their jurisdiction in a wide range of contexts. Agency aggrandizement can raise federalism concerns by intruding on areas of traditional state competence and can distort the allocation of authority within the Executive Branch or between agencies and courts. Because jurisdictional questions often involve categorical assertions of authority to act in a particular sphere, they can have tremendous practical and financial significance that warrants subjecting them to non-deferential review.

II. Courts Can Draw Principled Distinctions Between Jurisdictional And Non-Jurisdictional Questions

Justice Scalia's concurring opinion in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487

U.S. 354, 377–81 (1988), articulates what some courts and commentators view as "the most compelling objection" to a no-deference rule for jurisdictional interpretations. See Sales & Adler, 2009 U. Ill. L. Rev. at 1555; see also *Ry. Labor Execs.' Ass'n* v. *Nat'l Mediation Bd.*, 29 F.3d 655, 676–677 (D.C. Cir. 1994) (en banc) (Williams, J., dissenting). That opinion stated, "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority." *Miss. Power*, 487 U.S. at 381 (Scalia, J., concurring in judgment). This line-drawing concern rests not on an affirmative theoretical defense of *Chevron* deference. Rather, the claim is "prudentialist" and "hangs by [the] empirical thread" that it is "impossible (or prohibitively difficult) to identify a jurisdictional question as jurisdictional." Sales & Adler, 2009 U. Ill. L. Rev. at 1508.

There are, however, compelling reasons to believe that courts can draw principled and consistent distinctions between statutes that address an agency's jurisdiction and those that do not. The possibility of "hard cases" does not justify extending *Chevron* deference to circumstances—like here—that unquestionably involve limits an agency's jurisdiction. In closer cases, courts have recourse to traditional tools of statutory construction, and a body of case law drawing similar lines in the context of courts' subject-matter jurisdiction. Finally, courts can rely on several familiar norms to identify jurisdictional questions.

A. The Possibility Of Hard Cases Does Not Justify Extending *Chevron* Deference To Cases That Unquestionably Involve Limits On Agency Jurisdiction

The possibility of hard cases cannot justify extending *Chevron* deference to issues that unquestionably involve agency jurisdiction.

This case provides a compelling example. As the court of appeals correctly recognized, the threshold question is whether Congress delegated authority to the FCC to act *at all* to define the meaning of the phrase "a reasonable period of time" in Section 332(c)(7)(B)(ii). The statute provides clear textual indications that it addresses, and serves to limit, the FCC's authority to act. First, Section 332(c)(7)(A) effects a blanket reservation of "authority" to state and local governments to act in an area of traditional state authority—land use. 47 U.S.C. § 332(c)(7)(A). This reservation of rights constitutes an express restraint on federal jurisdiction in the area, and thus FCC's authority to act.[5] Section 332(c)(7)(B)(v) grants jurisdiction to *courts* to adjudicate alleged violations of subparagraph (ii) (the "reasonable period of time" requirement), leav-

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[5] The fact that the subject-matter (zoning decisions) is an area well outside the core content of the Communications Act also supports treating the question as jurisdictional. See Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 Cardozo L. Rev. 989, 1011 (1999) ("The first criterion for determining whether *Chevron* deference should apply is whether the questioned jurisdiction is within the agency's core regulatory assignment.").

ing the FCC with jurisdiction over a different and narrower class of cases involving the effects of radio frequency emissions. *Id.* § 332(c)(7)(B)(v). Where, as here, the threshold question is whether Congress has delegated authority to the agency to act at all, courts need not draw the distinction, discussed in the *Mississippi Power* concurrence, between an agency's "authorized application of its authority" and the agency "exceeding its authority." 487 U.S. at 381 (Scalia, J., concurring in judgment).

The consequences of affording deference to assertions of jurisdiction are significant—indeed, deference is often dispositive. See p. 25, *supra*. So it was here: The court of appeals upheld the FCC's assertion of authority on the basis that the statute did not unambiguously *preclude* the FCC from implementing the provisions at issue, in essence applying a default rule in *favor* of jurisdiction. That approach is difficult to square with the "axiomatic" rule that agencies are "limited to the authority delegated by Congress." *Bowen*, 488 U.S. at 208. "[I]f [courts] were to presume a delegation of power from the absence of an express withholding of such power, agencies would enjoy virtually limitless hegemony." *ABA*, 430 F.3d at 468; accord *Am. Bus Ass'n*, 231 F.3d at 8 (Sentelle, J., concurring) ("as this Court persistently has recognized, a statutory silence on the granting of a power is a *denial* of that power to the agency").

B. Courts Can Rely On Traditional Tools Of Statutory Interpretation In Identifying Jurisdictional Issues

Because "an agency literally has no power to act * * * unless and until Congress confers power upon it" through legislation, *La. Pub. Serv. Comm'n*, 476 U.S. at 374, the task of identifying jurisdictional questions is ultimately one of statutory construction. As in the above analysis of § 332(c)(7)(B), courts are guided in that effort by traditional tools of interpretation, under which "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

Courts use these tools to identify Congress's expressed intent about whether a statute involves an agency's jurisdiction—*e.g.*, the agency's "power to act" in a particular sphere, or power to regulate a class of persons or entities. Cf. *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004) (jurisdiction refers to "a court's adjudicatory authority"—i.e., "prescriptions delineating the classes of cases * * * and the persons" implicating that authority). This interpretive exercise often yields a clear result. See Sales & Adler, 2009 U. Ill. L. Rev. at 1555–1556 (identifying categories of cases "it will be quite easy for courts to classify as jurisdictional"). As noted above, the court of appeals had little difficulty distinguishing between the two different kinds of statutory questions presented here: first, whether the FCC had authority *at all* to address what constitutes "a reasonable period

of time" under § 332(c)(7)(B)(ii); and second, whether the 90- and 150-day periods exceeded the FCC's authority.

Courts routinely engage in a similar line-drawing exercise in defining the jurisdiction of lower federal courts. See *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237, 1244–1245 (2010); *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 510 (2006). A series of recent cases has helped to bring clarity and structure to the distinction between jurisdictional and non-jurisdictional statutes. *Arbaugh*, 546 U.S. at 510–511. The principles courts apply in that context provide guidance for identifying limits on the jurisdiction of federal administrative agencies. See, *e.g.*, *Ry. Labor Execs.*, 29 F.3d at 676 (Williams, J., dissenting) (in addressing whether a jurisdictional issue affected the reviewability of agency action, observing that "courts commonly classify issues as relating to the 'jurisdiction' of Article III courts, and make consequences turn on the classification").

There are, to be sure, important differences between courts' subject-matter jurisdiction and the jurisdiction of administrative agencies. Those differences preclude adopting here the clear-statement rule from *Arbaugh*, 546 U.S. at 515–516.[6] But these

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[6] Under *Arbaugh*, courts will treat an issue as jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional," but not "when Congress does not rank a statutory limitation on coverage as jurisdictional." 546 U.S. at 515. Because this rule treats ambiguous statutes as non-jurisdictional, importing it to the *Chevron* context would greatly expand the scope of issues for which

cases are nonetheless instructive on whether courts can draw principled and consistent distinctions between jurisdictional and non-jurisdictional statutes.

This Court recently addressed the distinction between jurisdictional and non-jurisdictional requirements in *Reed Elsevier*. The Court considered a number of different factors in interpreting the statute at issue. It focused "principally on [an] examination of the text of [the statute]," addressing whether it "clearly stat[es]" that a requirement "count[s] as jurisdictional." 130 S. Ct. at 1244 (internal quotation marks omitted). As part of that inquiry, the Court first considered whether anything in "prior * * * cases" showed that the requirement "imposed a jurisdictional limit." *Id.* Second, it asked whether the statute's "text and structure * * * demonstrate that Congress 'rank[ed]' th[e] requirement as jurisdictional." *Id.* (quoting *Arbaugh*, 546 U.S. at 513–516). The Court asked whether the provision was "located in a [statutory] provision 'separate' from * * * [the] jurisdiction-granting section," but did not suggest that factor was determinative. *Id.* (quoting *Arbaugh*, 546 U.S. at 514–515). And the Court considered generally whether the requirement "could * * * fairly be read to 'speak in jurisdictional terms or in any way refer to * * * jurisdiction.'" *Id.* (quoting *Arbaugh*, 546 U.S. at 515).

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agencies receive deference. Allowing agencies to define their jurisdiction based on ambiguous statutes would be at odds with the rule that agencies have only the authority specifically vested in them by Congress. *La. Pub. Serv. Comm'n*, 476 U.S. at 374; Sales & Adler, 2009 U. Ill. L. Rev. at 1534–1535.

Bowles v. *Russell*, 551 U.S. 205 (2007), gave close attention to how a provision has historically been treated. "*Bowles* stands for the proposition that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier*, 130 S. Ct. at 1247–1248. *Bowles* analyzed not only the statute at issue, but also how courts had historically treated the "type of limitation" as found in other statutes. *Id.* at 1248; *Bowles*, 551 U.S. at 208–210.

In many cases, application of these interpretive tools will provide a clear indication that a question involves agency "jurisdiction"—in some cases because Congress or courts have explicitly so specified. For instance, *ABA* addressed whether attorneys engaged in the practice of law were "financial institutions subject to th[e] [FTC's] jurisdiction" within the meaning of 15 U.S.C. § 6804(a)(1). 430 F.3d at 459. Similarly, *Valley Freight* involved the question whether shipments were subject to a tariff based on the ICC's "'jurisdiction over transportation by motor carrier * * * on a public highway.'" 856 F.2d at 551 (quoting 49 U.S.C. § 10521 (1982)). This Court has repeatedly characterized the Clean Water Act's reference to "waters of the United States" as defining the regulatory "jurisdiction of the Corps." *SWANCC*, 531 U.S. at 168–171; accord *Rapanos*, 547 U.S. at 731 (plurality opinion) (the Clean Water Act "authorizes federal jurisdiction only over 'waters'"). And courts have defined the scope of FCC regulatory authority under its "ancillary jurisdiction." See, *e.g.*,

AT&T Corp., 525 U.S. at 380; *Midwest Video*, 440 U.S. at 697.

C. Well Established Background Principles Help Identify Jurisdictional Questions

Where the statutory text, case law, and historical context do not provide an immediate answer, courts can also look to several familiar principles in identifying jurisdictional questions.

First, jurisdiction is often implicated where an agency seeks to regulate in a way that affects the balance of authority between the federal government and the states—particularly where the agency is unable to cite clear statutory authorization for its actions. As reflected in this Court's clear-statement cases, Congress is presumed to be aware of, and not "readily interfere" with, the "usual constitutional balance between the States and the Federal Government." *Gregory*, 501 U.S. at 460–461 (internal quotation marks omitted). It follows that when legislating in areas of traditional state authority, Congress will take care to limit federal agency jurisdiction to safeguard state interests.

Such concerns are highlighted in this case, where the FCC sought to regulate state and local land-use determinations despite an express reservation of rights over such decisions. They were also present in *SWANCC*, where the Corps' claim of federal jurisdiction to regulate wetlands "alter[ed] the federal-state framework" and "invoke[d] the outer limits of Congress' power" without a "clear indication that Congress intended that result." 531 U.S. at 172–173. The D.C. Circuit in *ABA* rejected the FTC's at-

tempt to regulate attorneys engaged in the practice of law "with no other basis than the observation that the [statute] did not provide for an exemption" for attorneys. 430 F.3d at 468. The court emphasized that "[t]he states have regulated the practice of law throughout the history of the country," and declined to extend federal law "into [that] are[a] of State sovereignty" "unless the language of the federal law compels the intrusion." *Id.* at 471.

Second, and for similar reasons, jurisdictional questions are likely to arise where a statute divides authority between two agencies, or between an agency and the courts. This case implicates the latter concern, with the FCC asserting authority to define what constitutes "a reasonable period of time" under § 332(c)(7)(B)(ii)—a question Congress directed would be decided by the courts. 47 U.S.C. § 332(c)(7)(B)(v). Lower courts have frequently declined to grant *Chevron* deference where agencies share administrative authority. See *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1253 (D.C. Cir. 2003) (surveying cases); Gellhorn & Verkuil, 20 Cardozo L. Rev. at 1017 ("[T]he usual presumption is that Congress does not intend to divide regulatory responsibility among two or more agencies."). This can occur not only for "generic statutes that apply to dozens of agencies," such as the Federal Advisory Committee Act, the Privacy Act, or the Administrative Procedure Act, but also for statutes such as the Federal Deposit Insurance Act, where a smaller group of agencies have specialized enforcement authority that potentially overlaps, creating risks of inconsistency or uncertainty. 351 F.3d at 1252–

1253. Similarly, DHS's assertion of authority to modify the adjudicatory powers of the Federal Labor Relations Authority raised questions of DHS's statutory jurisdiction. *NTEU*, 452 F.3d at 866. Declining to extend deference where Congress has divided authority between agencies or between an agency and the courts aligns with *Chevron*'s teaching that an agency is only entitled to deference over a statute that it is charged with administering. *Chevron*, 467 U.S. at 843; *Adams Fruit*, 494 U.S. at 649.

Third, jurisdictional issues are more likely to arise where an agency asserts a novel authority following long inaction or an affirmative disclaimer of authority. An agency's longstanding view that it lacks authority to regulate may reflect an accurate understanding of the enacting Congress's intent. Or, where Congress has amended an agency's organic statute over the years against the background of an agency disclaiming authority to regulate in an area, there may be scant reason to believe that Congress intended the agency to have jurisdiction in that area. Cf. Gellhorn & Verkuil, 20 Cardozo L. Rev. at 1012 ("[I]f the agency has not previously regulated the product or service, or asserted the power to do so, then there seems to be little basis for assuming that Congress would have wanted courts to defer to agency interpretations.").

This Court discussed these principles in *Brown & Williamson*, holding that Congress had "precluded the FDA from asserting jurisdiction to regulate tobacco products." 529 U.S. at 126. The Court addressed at length the history of "the FDA's disavowal of jurisdiction"—i.e., the agency's "consistent and re-

peated statements that it lacked [such] authority," and the fact that FDA had taken that position "since the agency's inception." *Id.* at 144–146. And in *ALA*, the D.C. Circuit emphasized that the FCC's assertion of authority to impose "broadcast flag" requirements broke with 70 years of practice and contradicted the Commission's prior statements to Congress that it lacked such authority. 406 F.3d at 691, 703. To be sure, not all shifts in policy implicate questions about agency jurisdiction. See, *e.g.*, *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). But "[t]he fact that an agency suddenly makes a choice it previously thought it legally could not make, when coupled with other factors, is a sign that the action may be jurisdictional." Sales & Adler, 2009 U. Ill. L. Rev. at 1560.

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In sum, federal courts can identify statutes affecting an agency's jurisdiction in a principled and consistent way. The possibility of some close cases provides no justification to extend *Chevron* deference, especially where—as here—the statute involves the clearly-jurisdictional threshold question of whether Congress delegated authority for the agency to act at all.

CONCLUSION

The Court should vacate the judgment below and remand for further proceedings.

Respectfully submitted.

ELLEN STEEN
DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Ave. SW
Suite 1000W
Washington, DC 20024
(202) 406-3618

Counsel for American Farm Bureau Federation

JOHN P. ELWOOD
Counsel of Record
JEREMY C. MARWELL
VINSON & ELKINS LLP
2200 Pennsylvania Ave. NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

Counsel for Amici Curiae

THOMAS J. WARD
AMY C. CHAI
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, NW
Washington, DC 20005
(202) 266-8200

Counsel for National Association of Home Builders

ROBIN S. CONRAD
RACHEL L. BRAND
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20063
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America

KAREN R. HARNED
ELIZABETH MILITO
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F. Street, NW
Suite 200
Washington, DC 20004
(202) 406-4443

Counsel for NFIB Small Business Legal Center

DEBORAH R. WHITE
RETAIL LITIGATION
CENTER
1700 N. Moore Street
Suite 2250
Arlington, VA 22209
(703) 841-2300

Counsel for Retail Litigation Center

KATIE SWEENEY
NATIONAL MINING
ASSOCIATION
101 Constitution Ave., NW, Suite 500 East
Washington, DC 20001
(202) 463-2600

Counsel for National Mining Association

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